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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CROWN ZELLERBACH CORPORATION,
Petitioner,

v.

ARTHUR N. ARONSEN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petition for Writ of Certiorari

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September 20, 1982

QUESTIONS PRESENTED FOR REVIEW

1. Does an employee's belief that his employer may reconsider its announced decision to terminate him postpone the running of the 300-day filing period of the Age Discrimination in Employment Act of 1967? If so, how can that result be reconciled with this Court's decision in *Delaware State College* v. *Ricks*, which held that an employee's reasonable belief that an employer may reverse an adverse employment decision did not postpone the deadline for filing a charge of discrimination?

2. In an action brought under the Age Discrimination in Employment Act of 1967 by an employee who failed to file on time his notice of intent to sue, is the employer equitably estopped from raising the defense of untimeliness merely because it paid the employee severance benefits after notifying him of the decision to terminate him? If so, how can that result be reconciled with this Court's decisions in *Ricks* and *Chardon* v. *Fernandez*, both of which held that the continued employment of an employee after he is notified of an adverse employment decision (denial of tenure in *Ricks* and termination of employment in *Chardon*) could not extend the time for filing charges of discrimination?

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OPINIONS OF THE COURTS BELOW

This petition for writ of certiorari seeks review of the decision of the United States Court of Appeals for the Ninth Circuit in *Aronsen* v. *Crown Zellerbach,* 662 F.2d 584 (9th 1981), as amended by an unpublished order dated June 2, 1982. Copies of the court of appeals' opinion and amending order are attached to this petition as appendices A and B respectively.

The court of appeals reversed the judgment of the United States District Court for the Northern District of California granting the motion of petitioner to dismiss respondent's complaint. A copy of the opinion of the district court, reported as *Aronsen* v. *Crown Zellerbach,* 15 Emp. Prac. Dec. (CCH) ¶ 8076 (N.D. Cal. 1978), is attached to this petition as appendix C.

BASIS FOR JURISDICTION OF THIS COURT

The judgment of the court of appeals is dated November 23, 1981, and was entered on that date. By order dated June 21, 1982, the court of appeals denied the petition for rehearing and rejected the suggestion for rehearing *en banc.* This order is attached to the petition as appendix D.

Jurisdiction over the petition, filed with this Court on September 20, 1982, exists pursuant to sections 1254(1) and 2101(c) of title 28 of the United States Code.

LISTING OF PETITIONER'S PARENT COMPANIES, NON-WHOLLY OWNED SUBSIDIARIES AND AFFILIATES

Petitioner Crown Zellerbach Corporation does not have any parent companies. Its non-wholly owned subsidiaries and affiliates are Crown Simpson Corporation, Crown Zellerbach Canada Limited, Crown Simpson Pulp Company, Procesadora

Industrial de Moderna, S.A. de C.V., Grupo Mapel, S.A. de C.V., Fabrica de Papel San Francisco, S.A. de C.V., Rachali de Chihuahua, S.A., Puertas Tarahumares, S.A. de C.V., Grupo Forestal Industrial, S.A. de C.V., Empaques Flexibles, S.A., Sigma, S.A., Q Corp., and Bufkor, Inc.

APPLICABLE STATUTE

29 U.S.C. § (1976):

No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed—

(1) within one hundred and eighty days after the alleged unlawful practice occurred, or

(2) in a case to which Section 633(b) of this title applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

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Petition for Writ of Certiorari

INTRODUCTION

Two terms ago, this Court held that the time for bringing charges of employment discrimination under Title VII and 42 U.S.C. § 1981 begins to run when the employee is informed of the allegedly unlawful employment decision. *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980). This Court specifically held that the filing period is not extended even though the employee reasonably believes that the employer may change its decision, or because the employee continues to work for the employer after the adverse decision is announced.

Last term, in a *per curiam* decision, this Court held that the principle of *Ricks*, which involved denial of tenure to a college instructor, is equally applicable to an employee challenging his termination under 42 U.S.C. § 1983. *Chardon* v. *Fernandez*, 454 U.S. 6 (1981). This Court believed that *Ricks* so clearly governed the issues in *Chardon* that it found plenary review of the matter unnecessary and reversed the lower court on the basis of the certiorari papers alone.

In this case, a panel of the United States Court of Appeals for the Ninth Circuit refused to follow *Ricks* and *Chardon*. Even though there is no doubt that the rulings in those cases apply equally to an action brought under the Age Discrimination in Employment Act of 1967, *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750 (1979), and even though the panel's opinion acknowledged the applicability of *Ricks* to an ADEA action, the court of appeals disregarded this Court's teaching. It held that the time for filing a notice of intent to sue under the ADEA did not begin to run when the employee was told unequivocally that he was being terminated, was relieved of all job responsibilities, and received severance benefits. Instead, the court of appeals held that if the employee hoped that the employer might change its mind about the termination, the limitations period did not commence upon notice. The court of appeals also held that the employer's mere payment of severance benefits could constitute equitable estoppel, and preclude the employer from raising as a defense the untimeliness of the employee's notice of intent to sue.

A writ of certiorari should be granted because the court of appeals has wholly disregarded *Ricks* and *Chardon*, and its ruling in this matter directly conflicts with those decisions.

STATEMENT OF THE CASE

Respondent Arthur N. Aronsen ("Aronsen") brought this action against petitioner Crown Zellerbach Corporation ("Crown") in the United States District Court for the Northern

District of California under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* (1976) (the "ADEA"). Aronsen alleged that Crown had unlawfully terminated him because of his age. C.R. 2.[1]

The undisputed facts in the record show that Crown informed Aronsen not later than March 31, 1975, that it had decided to terminate his employment. C.R. 63, 104-06, 169. Aronsen was relieved of all employment responsibilities at the time he was informed of his termination. C.R. 63, 109. Thereafter, however, Crown provided Aronsen with numerous severance benefits, including payments equal to his former salary for a period of one year and reimbursement of expenses he incurred while seeking other employment. C.R. 63. Aronsen spent the following year looking for employment elsewhere and working for other employers. C.R. 63, 64, 119-25, 127-34, 149. During that year he received more than $70,000 worth of severance benefits from Crown and, while working for others, earned or was promised fees ranging from $35 per hour to $500 per day and totaling $22,000 from one employer and $26,000 from another. C.R. 63, 113-16, 121, 133.

Aronsen filed no claim of discrimination until January 1977, when he filed a notice of intent to sue under the ADEA with the Secretary of Labor. C.R. 58-61. He later commenced this action in the district court pursuant to 29 U.S.C. § 626(c).

Crown moved to dismiss Aronsen's complaint on the ground that he had not complied with section 7(d)(2) of the ADEA, 29 U.S.C. § 626(d)(2) (1976), which required him to file a notice of intent to sue not later than 300 days after the alleged unlawful practice occurred. Relying upon the affidavit of Ernest A. Mitchell, the Crown executive who had informed Aronsen of his termination, and Aronsen's own deposition testimony concerning his discussions with Mitchell, Crown asserted that Aronsen's time for filing his administrative charge began to run not later than March 31, 1975.

After allowing Aronsen a full opportunity to present evidence concerning the time he was notified of his termination,

[1] Citations are to the record before the court of appeals.

the district court held that it was undisputed that Aronsen had received notice of his termination by March 31, 1975. The district court further held that the time within which Aronsen was required to file notice of intent to sue began to run on that date. Because Aronsen did not file his notice of intent to sue until nearly two years later, one year beyond the 300-day period permitted by the ADEA, the district court dismissed the complaint as untimely.

Aronsen appealed the district court's judgment. He did not deny that he had been notified of Crown's decision to terminate him as early as March 31, 1975, but argued that the date in mid-1976 when he stopped receiving severance benefits from Crown should be used in determining the timeliness of his notice of intent to sue.

After the court of appeals took the matter under submission, this Court decided *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980). Because *Ricks* addressed the same issue pending before the Ninth Circuit, Crown immediately drew the court of appeals' attention to the decision. The panel requested and received further briefing from the parties on *Ricks*'s applicability to this action.

The court of appeals then issued its decision reversing the district court's judgment. Appendix A. Although acknowledging the applicability of *Ricks* to this case, 662 F.2d at 592, the Ninth Circuit held that summary judgment should not have been granted in Crown's favor because the record did not establish that Aronsen knew he was being terminated and that his termination was unlawful:

> Although [Crown] contends that Aronsen was informally informed of his termination by March 31, 1975, Aronsen disputes this. The trial record reveals Aronsen's *argument* that he was not specifically informed before March 31, 1975, of his termination. Under these circumstances, a factual dispute exists on the issue whether Aronsen knew or should have known on or before March 31, 1975 that he was being terminated or that he was being subjected to an unlawful practice.

662 F.2d at 594. (Emphasis supplied.)

The Ninth Circuit also indicated that "[o]n remand, the issue of equitable tolling *may arise.*" *Id.* at 595. (Emphasis supplied.) Noting Crown's payment of severance benefits to Aronsen and speculating that Aronsen might have feared that they would be discontinued if he filed a charge of discrimination against Crown, the court of appeals suggested that Aronsen could invoke equitable modification of the limitations period if he alleged and were able to establish certain facts. The court of appeals acknowledged that the issue of equitable tolling had not been raised by Aronsen on appeal, but justified its reliance on the doctrine to reverse the district court on the ground that it was a question of law connected with "the contested notice date issue," and therefore did not "prejudice" Crown. *Id.* n.20.

Crown immediately petitioned the court of appeals for rehearing because the panel had misconstrued the record. The court of appeals had based its ruling on facts not present in the record and on issues not raised before the district court or on appeal. Aronsen had never denied that he had been informed by March 31, 1975, of his termination; instead, he had freely admitted receiving notice of termination by that date. C.R. 104-06, 169. Nor had Aronsen contended that he was unaware of the law against age discrimination in employment. To the contrary, the handwritten notes which he submitted in opposition to Crown's motion to dismiss his complaint contained an entry made more than 300 days before he filed notice of intent to sue in which he expressed the belief that he was the victim of age discrimination. C.R. 156. Finally, Aronsen had never argued that his filing period should be equitably modified. Indeed, he focused solely on the issue of when the limitations period began to run. Aronsen conceded that if the period began to run when he was notified of the decision to terminate him, the notice of intent to sue was untimely.

These undisputed facts were brought to the Ninth Circuit's attention in Crown's petition for rehearing. In addition, Crown noted this Court's recent decision in *Chardon* v. *Fernandez*, 454 U.S. 6 (1981), in which the principle of *Ricks* was applied to

the claims of discharged employees. Crown asserted that *Ricks* and *Chardon* compelled the court of appeals to affirm the decision of the district court.

The Ninth Circuit panel declined to reverse its decision, however. Instead, it issued a three-page "Order Amending Opinion" which deleted various passages in the original opinion and substituted new language for some of them. Appendix B.

In its amended opinion, the Ninth Circuit acknowledged that there was no dispute in the record that Aronsen knew by March 31, 1975, that he was being terminated. It also dropped its suggestion that Aronsen had to be aware that his termination was unlawful in order for the limitations period to commence. Having corrected these errors, the panel justified its reversal of the district court on the new ground that summary judgment was improper because there was evidence Aronsen believed that Crown might reconsider its decision to terminate him.

> The record does establish that Aronsen was informed as early as March of 1975 that Crown planned to terminate him. Without more this would seem to entitle Crown to summary judgment. The record also reveals, however, that Aronsen believed that Crown might reconsider its decision to terminate him. Whether this belief was reasonable is not a matter that can be determined on summary judgment.

Order Amending Opinion at 2.

The court of appeals also modified its discussion of equitable tolling. The panel deleted its original language which had suggested that the issue of equitable tolling "may arise" on remand. The revised opinion asserted that Aronsen's alleged belief that Crown might reconsider its decision, in and of itself, "raises the issue of equitable modification." *Id.* at 3.

The Order Amending Opinion contained no discussion of legal authorities. It made no effort to reconcile its result with *Ricks* and *Chardon*.

REASONS FOR GRANTING THE WRIT

1. Under this Court's Decisions in *Delaware State College* v. *Ricks* and *Chardon* v. *Fernandez*, the Time in Which to File a Notice of Intent to Sue Commences When the Employee Is Told of the Decision to Terminate Him.

Twice in the last two terms, this Court addressed the issue of when the filing limitations periods under the various civil rights statutes begin to run. Each time, this Court declared that those filing periods begin to run as soon as an adverse employment decision is made and announced to the employee.

In *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980), the plaintiff, a black Liberian who worked as a college instructor, claimed that a decision to deny him tenure violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. § 1981. The plaintiff was informed in 1974 that the college had decided to deny him tenure but that he would be permitted to continue to teach under a "terminal" contract which would expire the next year. Because he had filed an internal college grievance concerning the college's decision, the plaintiff was also informed that if the college's educational policy committee and board of trustees decided that tenure should be granted, the decisions of those bodies would supercede the previous decision. 449 U.S. at 252-53 & n.2.

The grievance was ultimately denied, and the plaintiff subsequently filed a charge of discrimination with the Equal Employment Opportunity Commission and commenced a suit in federal court under Title VII and 42 U.S.C. § 1981. Measured from the date the plaintiff had ceased employment with the college under the one-year "terminal" contract, the suit was timely, but measured from the date he had been told of the denial of tenure, the suit was time-barred. Concluding that the latter date governed, the trial court dismissed the suit.

The Third Circuit Court of Appeals reversed. That court held that because of public policy, the limitations period for an employee to file charges of discrimination should not run while he continues to work for the employer.

This Court directed the Third Circuit to reinstate the district court's order dismissing the complaint. This Court declared that the applicable filing periods began to run when the college informed the plaintiff of its allegedly unlawful decision to deny him tenure, and not when he actually stopped working as an instructor.

This Court concluded that the fact that an employee continues to work for the employer does not suspend the limitations period: "Mere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination." 449 U.S. at 257.

In addition, this Court held that the pendency of the grievance procedure during which the college undertook to review its initial decision did not toll the running of the limitations periods.[2] "[T]he pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the running of the limitations periods." 449 U.S. at 261.

In *Chardon* v. *Fernandez*, 454 U.S. 6 (1981), in a *per curiam* opinion rendered on the basis of the certiorari papers alone, this Court applied the rule announced in *Ricks* to a case involving termination of employment allegedly in violation of the Civil Rights Act of 1871, 42 U.S.C. § 1983. In *Chardon*, the plaintiffs were given advance warnings that they would be terminated from employment at certain dates in the future. After they were discharged, they commenced actions in federal court claiming that their terminations violated the civil rights statute. Measuring the timeliness of the suit from the dates that notices of the termination decisions were given, the district court dismissed the complaints as time-barred.

[2] The contrary view was argued by the United States Equal Employment Opportunity Commission in its *amicus curiae* brief.

The First Circuit Court of Appeals reversed. It distinguished *Ricks* on the ground that the plaintiff in that case had alleged unlawful denial of tenure, while the plaintiffs in *Chardon* had alleged the termination of their employment as the "unlawful employment practice."

This Court summarily reversed the court of appeals. It declared:

> In *Ricks,* we held that the proper focus is on the time of the *discriminatory act,* not the point at which the *consequences* of the act become painful. . . . The fact of termination is not itself an illegal act. In *Ricks,* the alleged illegal act was racial discrimination in the tenure decision. . . . Here, respondents allege that the decision to terminate was made solely for political reasons, violative of First Amendment rights. There were no other allegations, either in *Ricks* or in these cases, of illegal acts subsequent to the date on which the decisions to terminate were made. . . . The fact that [the plaintiffs] were afforded reasonable notice cannot extend the period in which suit must be filed.

454 U.S. at 8. (Emphasis in original, citations omitted.)

Thus, *Ricks* and *Chardon* establish a clear rule for determining timeliness in suits challenging allegedly unlawful employment terminations: The limitations period begins to run once the allegedly unlawful decision to terminate has been made and communicated to the employee. Neither the possibility that the employer may reconsider its decision, nor the continued receipt of employment benefits tolls the running of the filing period.

2. The Ninth Circuit's Holding that Aronsen's Filing Period Did Not Begin to Run Because He Hoped that Crown Might Reconsider Its Decision Violates the Rule Established by *Ricks* and *Chardon.*

In its revised opinion, the Ninth Circuit's first ground for reversing the trial court was stated as follows:

> The record does establish that Aronsen was informed as early as March of 1975 that Crown planned to terminate

> him. Without more this would seem to entitle Crown to summary judgment. *The record also reveals, however, that Aronsen believed that Crown might reconsider its decision to terminate him.* Whether this belief was reasonable is not a matter that can be determined on summary judgment.

Order Amending Opinion at 2. (Emphasis supplied.)

This ground for decision is clearly precluded by *Ricks* and *Chardon*. In *Ricks*, the plaintiff was expressly told that by virtue of the grievance proceeding, the employer was in fact reconsidering the denial of tenure and that it might reverse the decision. Certainly the plaintiff in *Ricks* had every reason to believe that the decision might be reversed. Nevertheless, this Court held that a possiblity of reconsideration, even when formalized through a grievance procedure, does not suspend the limitations period.

In this case, the only alleged fact concerning reconsideration is Aronsen's self-serving declaration that he thought it was "possible" that Crown would reconsider. C.R. 151. If an employer-generated belief in reconsideration has no effect on the timeliness of a charge of discrimination, *a fortiori* an employee-generated belief that reconsideration is possible also cannot suspend the limitations period.

Because the panel's decision in this case cannot in any way be squared with *Ricks* and *Chardon*, it must be reversed.

3. The Ninth Circuit's Holding that the Mere Payment of Severance Benefits Can Result in Equitable Modification of the Limitations Period Violates the Rule Established by *Ricks* and *Chardon*.

The Ninth Circuit also held that Crown could be estopped from raising the untimeliness of Aronsen's notice of intent to sue merely because it paid him severance benefits after informing him of its decision to terminate him. According to the court of appeals, the payment of post-termination benefits could give rise to an equitable estoppel because it might have led Aronsen to believe that Crown would reconsider its decision to terminate him, and because Aronsen might have feared that the benefits would be ended if he brought charges of discrimination against the company.

The panel's holding directly contradicts the rule of *Ricks* and *Chardon*. In both cases, the plaintiffs continued to be employed *after* they were informed of the adverse decision, yet this Court expressly held that their continued employment had no bearing on the issue of timeliness. If the possibility of equitable tolling merely because of continued receipt of employment benefits precludes the dismissal of a complaint on timeliness grounds, then this Court would not have sustained the dismissal of the complaints in *Ricks* and *Chardon*.

Indeed, *Ricks* and *Chardon* presented more likely grounds for tolling since the plaintiffs in those cases continued active employment. In that setting an employee may well hope for reconsideration. Where, as here, the employee is relieved of his duties, the termination becomes final.

In addition, the court of appeals' ruling rests on its own speculation about Crown's possible motives in providing the severance benefits, and not on facts in the record. There is no evidence that Crown did anything to suggest it would reconsider its decision to terminate Aronsen, or that it would stop his severance benefits if he filed a notice of intent to sue.

The court of appeals simply raised an issue where none had existed. Aronsen never relied on the doctrine of equitable modification before the district court or the court of appeals, and he has never alleged facts to support that theory. In *Ricks*, this Court did not permit the plaintiff to change his legal theory in the midst of appellate review when his complaint failed to plead supporting facts. 449 U.S. at 257. This Court could have entertained arguments of equitable estoppel in *Ricks* and *Chardon*, but it did not. The Ninth Circuit had no basis for recognizing such an argument here.

Through its speculation about facts and *sua sponte* raising of new issues, the court of appeals has effectively drained the true meaning of *Ricks* and *Chardon*. After all, most discharged employees receive some form of post-termination benefits, and every one of them is always free to claim that he hoped his employer would reconsider the termination decision. Thus, if the Ninth Circuit's view prevails, in nearly any case where the notice of intent to sue is not filed on time, summary judgment

will not be granted because lurking in such facts will be an equitable estoppel argument. Regardless of the untimeliness of the charge of discrimination, the employer will be forced to trial.

But the purpose of limitations periods, as this Court noted in *Ricks*, is to "protect employers from the burden of defending claims from employment decisions that are long past." 449 U.S. at 256-57. The Ninth Circuit's decision in this case frustrates that purpose. Indeed, if the court of appeals' decision is permitted to stand, the short 300-day period that Congress specified for ADEA cases will be virtually eliminated.

The decision of the Ninth Circuit repudiates this Court's mandate in *Ricks* and *Chardon*. If the supremacy of this Court's rulings is to be maintained, the court of appeals' judgment must be reversed.

CONCLUSION

Under the facts of this case and the law as determined by this Court, the court of appeals' decision below cannot stand. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 20, 1982

APPENDIX A

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ARTHUR N. ARONSEN, *Plaintiff-Appellant,* v. CROWN ZELLERBACH, a corporation, *Defendant-Appellee.*	No. 78-1621 OPINION November 23, 1981

Before: TANG and PREGERSON, Circuit Judges, and KELLEHER,* District Judge.

TANG, Circuit Judge:

This is an appeal from the dismissal of an action brought under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (ADEA). On motion for summary judgment, the district court dismissed the action on the ground that Plaintiff Aronsen's "notice of intent to sue" was untimely filed with the Secretary of Labor, thus, failing to satisfy a prerequisite to suit under the ADEA. Because the determination of the date on which the unlawful act occurred is not free of factual dispute, we reverse.

* Honorable Robert J. Kelleher, United States District Judge for the Central District of California, sitting by designation.

I.

Plaintiff Aronsen worked as a Research Associate for Crown Zellerbach (Zellerbach) and his duties included seeking out new applications for Zellerbach goods and developing new products. He had worked for Zellerbach 28 years, his entire working life since graduating from college. By 1975, at age 52, he was earning $36,300 per year, plus benefits, bringing his total compensation to $42,500.

In his complaint, Aronsen alleged that Zellerbach terminated him solely on the basis of his age pursuant to its general plan to replace employees nearing retirement age with younger employees. Aronsen further complained that Zellerbach terminated him on April 21, 1976, and that he gave the required notice of intent to sue to the Secretary of Labor on January 19, 1977 (filed Jan. 24, 1977), about 270 days later. This asserted date is within the 300 day time period of 29 U.S.C. § 626(d)(2) but not within the 180 day period enumerated in § 626(d)(1). Affidavits and depositions in the record, however, suggest that at a meeting a year earlier, in the spring of 1975, a Zellerbach vice-president informally told Aronsen that he was being terminated. It is undisputed that after March 31, 1975, Aronsen did no regular work for the company, although he still received company paychecks. On March 31, 1976, Aronsen was officially terminated. At that time, his "regular" payments ceased and his payments for accumulated vacation benefits began, lasting until April 21, 1976, the date noted by Aronsen in his complaint as marking his termination with Zellerbach. Because the March 31, 1976 date is also within the 300 day period, the notice would have been timely filed if that were the operative date. March 31, 1975, however, is far outside the 300 day limit. As a matter of law, the district court concluded that termination, and hence the unlawful practice, occurred at a meeting on or before March 31, 1975.

At the meeting on March 31, 1975, executive vice-president Mitchell allegedly told Aronsen that he was being terminated and that Aronsen would be given a choice between

either taking a demotion to another position or accepting termination and receiving Zellerbach's assistance in finding another position, while maintaining the same payroll and benefits status during the transition period. Aronsen chose the latter alternative. His transition period, originally scheduled to last six months, was extended to March 31, 1976. The March 31, 1975 meeting and "termination" were not memorialized by any formal record notifying Aronsen.

Between March 31, 1975 and March 31, 1976, Aronsen was on the payroll at his normal salary. The record does not show whether his status was changed on the company's personnel records. He did not perform his former duties, but he did retain the perquisites of his position: office, secretary, travel, and expense account. Aronsen performed one brief assignment for Zellerbach in the summer of 1975 and took outside consulting jobs, but always with the permission of vice-president Mitchell.

In a letter dated March 18, 1976, senior vice-president Jamieson wrote to Aronsen confirming a March 2, 1976 discussion "regarding [Aronsen's] termination of employment with Crown Zellerbach on March 31, 1976."[1] The letter also referred to the period between March 31, 1975 and March 31, 1976 as a "terminal leave of absence with pay." In its briefs and motions, Zellerbach also described its payments to Aronsen during this period as "severance benefits." The district court relied on these characterizations, although, so far as the record shows, Zellerbach's personnel records contain no change in Aronsen's status to reflect "leave" or "severance."

The district court concluded that March 31, 1975 was the termination date based on the following factors: 1) on or by that date Aronsen was told he was being terminated; and 2) on that date his active performance of work for the company

[1] We cannot determine from the record when the letter was received by Aronsen.

ceased. The court further ruled that Zellerbach's actions after that date did not toll the 300 day period under the equitable tolling doctrine. Accordingly, the district court dismissed the action because the notice of intent to sue was not filed within 300 days of March 31, 1975.

II.

The first issue we address concerns the length of the statutory filing period in this case. If 180 days instead of 300 days is the applicable period then we need not reach the other issues because even the occurrence dates advocated by Aronsen are beyond a 180 day period.

The ADEA requires a grievant to file a "notice of intent to sue" within 180 days of an alleged statutory violation or, in a deferral state, within 300 days. *See* 29 U.S.C. § 626(d)(1), (2) (1976). In *Bean* v. *Crocker National Bank*, 600 F.2d 754 (9th Cir. 1979), we construed the deferral state time requirement to require filing with the Secretary of Labor within 300 days. *Id.* at 757-59; *See Naton* v. *Bank of California*, 649 F.2d 691, 694 n.2 (9th Cir. 1981). Since *Bean*, two other circuits have decided otherwise, holding that the grievant must commence proceedings with the state agency within 180 days in order to trigger the extended 300 day federal filing period.[2] Zellerbach urges us to reconsider our position and conform to the approach in these circuits. After re-examining the statute and considering intervening developments in the interpretation of the ADEA and the analogous filing periods under Title VII, however, we reaffirm *Bean's* holding that in deferral states ADEA grievants have 300 days to file.

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[2] *See Ewald* v. *Great Atlantic & Pacific Tea Co. Inc.*, 620 F.2d 1183, 1186-87 (6th Cir. 1980), *judgment summarily vacated*, 449 U.S. 914, 101 S. Ct. 311, 66 L. Ed. 2d 143 (1981); *Ciccone* v. *Textron Inc.*, 616 F.2d 1216, 1219-1221 (1st Cir. 1980), *judgment summarily vacated*, 449 U.S. 914, 101 S. Ct. 311, 66 L. Ed. 2d 143 (1981).

Section 626(d) of the ADEA, as in effect at the time of Aronsen's suit[3] provided:

> (d) No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed—
>
> (1) within one hundred and eighty days after the alleged unlawful practice occurred, or
>
> (2) in a case to which section 633(b) of this title applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

29 U.S.C. § 626(d) (1976).

This statutory language plainly states that grievants in section 633(b) cases (*i.e.*, complaints arising in deferral states) have 300 days to file. Unless section 633 requires a different interpretation, we see no reason to depart from the plain congressional language of section 626(d). Our decision in *Bean* so held, rejecting the interpretation that a grievant first must commence state proceedings within the 180 day period of section 626(d)(1) in order to qualify for the 300 day filing period of section 626(d)(2). *Bean*, 600 F.2d at 757-59.

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[3] In 1978, this section was amended so that only a "charge alleging unlawful discrimination" need be filed. *See* 29 U.S.C. § 626(d) (West Supp. 1981). According to the legislative history of this amendment, the charge requirement is satisfied by a written statement identifying the potential defendant and describing generally the action believed to be discriminatory. House Conf. Rep. No. 95-950, 95th Cong., 2d Sess. 12, *reprinted in* [1978] *U.S. Code Cong. & Ad. News* 504, 534. The change from "notice of intent to sue" to "charge" was not intended to alter the basic purpose of the prior law. *Id.*

Also, under a 1978 reorganization plan, filings are now with the Equal Employment Opportunity Commission (EEOC) rather than the Secretary of Labor. 1978 Reorg. Plan Nos. 1, 43 Fed. Reg. 19807, 92 Stat. 3781, *reprinted in* 5 U.S.C. Appendix II, at 157-163 (West. Supp. 1981).

At any rate, this appeal must proceed under the unamended version because Aronsen's action was brought prior to the amendment's effective date, April 6, 1978. *See Naton*, 649 F.2d at 694 n.2.

Section 14(b) of the ADEA, 29 U.S.C. § 633(b) (1976), provides that in cases occurring in deferral states no suit may be brought under section 626 until 60 days after proceedings have been commenced before the state agency, unless the state proceedings had terminated earlier.[4] In *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 99 S. Ct. 2066, 60 L. Ed. 2d 609 (1979), the Supreme Court held that section 633(b) required grievants in deferral states to resort to state administrative proceedings before bringing suit in federal court. *Id.* at 754-58, 99 S. Ct. at 2070-72. The Court also held, however, that such commencement of state proceedings for federal ADEA purposes need not be timely or effectual under state law. *Id.* at 758-64, 99 S. Ct. at 2072-75.

Although the *Evans* decision is instructive, it does not control the issue before us. Section 633(b) pertains to the relationship between commencing state proceedings in deferral states and filing a federal *suit*, not to the relationship between commencing state proceedings and filing a federal notice or charge with the Secretary of Labor. Nor did *Evans* directly address that latter relationship, except to point out that ADEA grievants may file with the state agency before, *simultaneously*, or even *after* they file notice with the Secretary of Labor. *Id.* at 756 & n.4, 99 S. Ct. at 2072 & n.4 (emphasis added).[5] Indeed, as *Bean* indicated, the only plausible inference to be derived

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[4] That section provides:

> In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: *Provided*, that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

29 U.S.C. § 633(b) (1976).

[5] In this respect, filing and the 60 day delay period under the ADEA are unlike the cognate provisions of Title VII. *See Mohasco Corp.* v. *Silver*, 447 U.S. 807 at 818-824, 100 S. Ct. 2486 at 2493-2496, 65 L. Ed. 2d 532 (1980); 42 U.S.C. § 2000e-5(c) (1976).

from *Evans* is that "compliance with state time limitations must be deemed irrelevant for purposes of determining whether a complainant has 180 or 300 days to file notice of intent to sue with the Secretary." *Bean*, 600 F.2d at 759.

Nothing in section 633(b), therefore, requires reading section 626(d)(2) in other than a plain manner. Nor does the legislative history of section 626(d) give any reason to believe any other interpretation was intended by Congress. *See Ewald* v. *Great Atlantic & Pacific Tea Co.*, 620 F.2d 1183, 1189-1190 (6th Cir. 1980) (Jones, J., dissenting). Nevertheless, since *Bean* was decided, two other circuits have held that section 626(d) must be read to imply a requirement that proceedings be commenced within 180 days of an alleged violation in order to qualify for the 300 day federal filing period. *See Ewald* v. *Great Atlantic & Pacific Tea Co.*, 620 F.2d 1183, 1186-87 (6th Cir. 1980), *judgment summarily vacated*, 449 U.S. 914, 101 S. Ct. 311, 66 L. Ed. 2d 143 (1981); *Ciccone* v. *Textron, Inc.*, 616 F.2d 1216 (1st Cir. 1980), *judgment summarily vacated*, 449 U.S. 914, 101 S. Ct. 311, 66 L. Ed. 2d 143 (1981). Those courts concluded that the ADEA's legislative purpose compelled them to ignore the plain meaning of section 626(d). *See Ewald*, 620 F.2d at 1186-87; *Ciccone*, 616 F.2d at 1220-21. In *Ewald*, the Sixth Circuit held that a grievant must file with either the state or federal agency within 180 days in order to qualify for the additional 120 day filing time.[6] In *Ciccone*, the First Circuit held that a grievant must file with the state agency within 180 days in order to secure the 120 day filing extension with the Secretary of Labor.

We agree that legislative purpose is important in statutory construction. Indeed, sometimes a statute's legislative purpose is contrary to the statute's plain meaning. *See United Steelworkers of America* v. *Weber*, 443 U.S. 193, 201-04, 99 S. Ct. 2721, 2726-28, 61 L. Ed. 2d 480 (1979). This, however, is not such a case. The purposes of the filing requirements of the

[6] The filing requirement imposed in *Ewald* for the grievant who chooses not to institute state proceedings within 180 days is paradoxical. In that situation, according to the *Ewald* majority, a grievant must file notice with the Secretary within 180 days of the violation in order to retain the advantage of the 300 day deadline. Obviously, there is no utility in a 300 day deadline if in order to preserve that schedule, an individual must first file an identical notice within 180 days of the alleged violation.

ADEA are not thwarted, hindered, or impaired by a literal reading of section 626(d)(2). Although the legislative history of the 1967 enactment of the ADEA does not fully illuminate the purpose behind section 626(d),[7] *see* H. Rep. No. 805, 90th Cong., 1st Sess. 4, *reprinted in* [1967] U.S. Code Cong. & Ad. News 2213, 2218-19, 2224, the history behind the 1978 amendments to section 626(d) confirms the plain meaning of the statute:

> Section 7(d) of the Act requires that an individual must give the Department of Labor notice of intent to file suit within 180 days after the alleged unlawful practice occurs. This period is extended to 300 days where the alleged unlawful practice occurs in a state which has an age discrimination statute which provides a remedy.

House Conf.Rep. No. 95-950, 95th Cong., 2d Sess. 12, *reprinted in* [1978] U.S. Code Cong. & Ad. News 504, 523-24. The express Congressional purpose of section 626(d) is "to provide the Department with sufficient information so that it may notify prospective defendants and to provide the Secretary with an opportunity to eliminate the alleged unlawful practice through informal methods of conciliation." *Id.* at 534. The *Ewald* and *Ciccone* construction of the statute is not necessary to achieve this purpose, because "[a] claim can hardly be labelled 'old' after 300 days, when the statute of limitations for ADEA claims is two years." *Ewald*, 620 F.2d at 1189 (Jones, J., dissenting).

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[7] Although the result of our review of the legislative history is consistent with our earlier delineation of the purpose behind section 626(d) in *Bean*, the question is whether it is proper in this case to rely on legislative history to discern a congressional purpose more restrictive than that yielded from a plain reading of the statute.

In interpreting statutes, we are not free to substitute legislative history for the language of the statute. Statutory interpretation must begin with the statute itself. *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 337, 99 S. Ct. 2326, 2330, 60 L. Ed. 2d 931 (1979). The court in *Ciccone* inverted this process. Although there is no *per se* bar preventing resort to legislative history, even when the statute, as here, is plain on its face, see *United States* v. *American Trucking Ass'n, Inc.*, 310 U.S. 534, 544, 60 S. Ct. 1059, 1064, 84 L. Ed. 1345 (1940); *but see T.V.A.* v. *Hill*, 437 U.S. 153, 184-85, 184 n.29, 98 S. Ct. 2279, 2296-97, 2296 n.29, 57 L. Ed. 2d 117 (1978), we question *Ciccone*'s reliance on legislative history to restrict access to the federal courts by imposing time restraints patently absent from and contrary to the statute's text.

Ewald and *Ciccone* also relied upon analogy to the similar filing provisions in Title VII, under which a complainant has 180 days to file with the EEOC in a nondeferral state and 300 days in a deferral state. *See* 42 U.S.C. § 2000e-5(e). The *Ewald* and *Ciccone* courts correctly stated that the provisions of Title VII and cases construing them may be used to interpret the ADEA.[8] At that time, however, a dispute existed on the issue whether section 2000e-5(e) requires a grievant to commence state proceedings within 180 days of an alleged violation in order to have the 300 days for filing the federal charge. *Compare Olson* v. *Rembrandt Printing Co.*, 511 F.2d 1228, 1233 (8th Cir. 1975) (en banc) (180 days) *with Doski* v. *M. Goldseker Co.*, 539 F.2d 1326, 1329-1333 (4th Cir. 1976) (300 days). Relying heavily on the rationale of the *Olson* case, the *Ewald* and *Ciccone* courts held that the ADEA filing periods should be construed as *Olson* construed the Title VII filing periods.

The *Olson* court's interpretation of the Title VII filing period, however, has not been accepted by all other circuits considering the issue. *See Doski*, 539 F.2d at 1330-33; *Silver* v. *Mohasco Corp.*, 602 F.2d 1083, 1087 (2d Cir. 1979) (300 days to file), *rev'd on other grounds*, *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 100 S. Ct. 2486, 65 L. Ed. 2d 532 (1980). In our recent decision in *Wiltshire* v. *Standard Oil Co.*, 652 F.2d 837 at 839 (9th Cir. 1981), we rejected *Olson* and found that 300 days was the proper time limit.

Moreover, in *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 100 S. Ct. 2486, 65 L. Ed. 2d 532 (1980), the Supreme Court disapproved of *Olson* because it had imposed filing restrictions not found in the statute's text:

> This language has been construed to require that the filing with the state [or federal] agency be made within 180 days. Although that construction is consistent with the

[8] The Supreme Court in *Lorillard* v. *Pons*, 434 U.S. 575, 583-84, 98 S. Ct. 866, 871-72, 55 L.Ed. 2d 40 (1978) suggested that remedial and procedural provisions of Title VII were not to be used as interpretive aids in understanding their remedial and procedural counterparts in the ADEA. It has apparently abandoned this stance, however, because in *Evans* the Court relied on its previous construction of Title VII procedural provisions in interpreting similar ADEA provisions. *See Evans*, 441 U.S. at 755-56, 99 S. Ct. at 2071-72.

general rule announced at the beginning of § 706(e), and is supported by one Congressman's understanding of the procedures at the time of the 1972 amendment to that section, see 1972 Leg. Hist., at 1863 (remarks of Rep. Dent), Congress included no express requirement that state proceedings be initiated by any specific date in the portion of the subsection that relates to time limitations in deferral States. Further, there are contemporaneous indications in the legislative history, which, while not authoritative, contradict Representative Dent's views.

In any event, we do not believe that a court should read in a time limitation provision that Congress has not seen fit to include, at least when dealing with "a statutory scheme in which laymen, unassisted by trained lawyers initiate the process." *Love* v. *Pullman Co.*, 404 U.S. 522, 527, 92 S. Ct. 616, 619, 30 L. Ed. 2d 679. In contrast to the construction of the statute we adopt today, the *Olson* approach, urged upon us by petitioner and amicus, is not compelled by the plain meaning of the statutory language. *Id.* at 816 n.19, 100 S. Ct. at 2492 n.19 (citations omitted). *See id.* at 814-15 n.16, 100 S.Ct. at 2490-91 n.16.[9] If the restrictive approach of *Olson* is not supported in Title VII, it is surely dubious to import like restrictions into the ADEA filing dead-

[9] In *Mohasco*, the question before the Supreme Court was whether a charge may be "filed" with the EEOC for 42 U.S.C. § 2000e-5(e) purposes only after the waiting requirements of 42 U.S.C. § 2000e-5(c) are met. Section 2000e-5(c) requires that, in deferral states, charges be referred to the state agency for a limited period before the EEOC charge is "filed." The Second Circuit had held that for purposes of meeting the time limit of section 2000e-5(e), the initial receipt by the EEOC would be deemed the filing rather than the formal filing after section 2000e-5(c) referral. The Supreme Court, three justices dissenting, reversed and held that the charge was filed for section 2000e-5(e) only after section 2000e-5(c) requirements were met. *Mohasco*, 447 U.S. at 818-824, 100 S. Ct. at 2493-2496.

The *Mohasco* problem does not arise under ADEA filing requirements because its waiting provision is drafted with reference to filing the federal lawsuit and does not affect filing the charge (or formerly, notice of intent to sue). *Compare* 29 U.S.C. §§ 633(b), 626(d) (West Supp. 1981) *with* 42 U.S.C. § 2000e-5(c) (1976) *and* 42 U.S.C. § 2000e-5(e) (1976). Thus, an ADEA grievant may file the federal charge within 300 days and thereafter commence state proceedings. Under *Evans*, that state filing need not be timely under state law to fulfill the requirement of section 633(b). Then, as long as the grievant waits 60 days or until state proceedings otherwise earlier terminate, the grievant may file federal suit under section 626(e), the ADEA's statute of limitations.

line provisions. Indeed, the Court in *Mohasco* clearly indicated its disagreement with *Ciccone* by equating it with *Olson*. *See Mohasco*, 447 U.S. at 814-15 n.16, 100 S. Ct. at 2490-91 n.16.[10]

The dictum in *Mohasco* effectively undercuts the authority and rationale of *Olson* and the derivative *Ewald* and *Ciccone* decisions. It is consistent with the general principle of statutory construction that a court should not add language to an unambiguous statute absent a manifest error in drafting or unresolvable inconsistency. *See* 2A J. Sutherland, Statutory Construction § 47.36, at 164 (Sands ed. 1973).[11] This principle was tacitly observed by the Supreme Court in its recent rulings on the *Ciccone* and *Ewald* decisions. *See Ewald* v. *Great Atlantic & Pacific Tea Co., Inc.*, 449 U.S. 914, 101 S. Ct. 311, 66 L. Ed. 2d 143 (1981) (summarily vacating judgment and remanding for further consideration in light of *Mohasco*); *Ciccone* v. *Textron, Inc.*, 449 U.S. 914, 101 S. Ct. 311, 66 L. Ed. 2d 143 (1981) (same). We therefore reaffirm the holding of *Bean* v. *Crocker National Bank* that in deferral states ADEA grievants have 300 days within which to file their charges (or formerly, their notice of intent to sue). *See Davis* v. *Calgon Corp.*, 627 F.2d 674, 676-77 (3rd Cir. 1980), *cert. denied*, 449 U.S. 1101, 101 S. Ct. 897, 66 L. Ed. 2d 827 (1981).

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[10] We are not unaware of the following language contained in *Evans:*

> In any event, even if the risk of bypass of state agencies were real, which it is not, states could readily avoid the possibility by extending their limitation periods to 180 days and by tolling their statutes of limitations upon the filing of a timely charge with the Department of Labor.

Id. at 764 n.11, 99 S. Ct. at 2075 n.11. Although this statement is cryptic, it arguably supports the proposition that a grievant must file with a state or federal agency within 180 days in order to secure the 120 day extension of section 626(d). Nevertheless, this language is entirely gratuitous and has been firmly rebutted by the Court's subsequent dictum in *Mohasco*.

[11] The power to substitute or add is denied where the word substituted or added affects the essence of the act or where the statute is unambiguous. *Sutherland, supra*, § 47.36, at 164. *See Harris* v. *Commissioner*, 178 F.2d 861, 863-64 (2d Cir. 1949) (Hand, J.) (error or omission must be plain before substitution allowed); *Davies* v. *Citizen's Trust Co.*, 242 N.Y. 196, 197-98, 151 N.E. 205, 206 (1926) (words that would defeat statutory purpose will not be inserted into act). Both criteria are present in the case of the statute in issue.

III.

A.

In order to be timely, Aronsen's "notice of intent to sue" must have been filed within 300 days "after the alleged unlawful practice occurred." 29 U.S.C. § 626(d)(2) (1976). *See* 29 U.S.C. § 626(d)(2) (West Supp. 1981). The date of his notice of intent to sue was January 19, 1977. Accordingly, the second question for our consideration is: On what date did the alleged unlawful practice occur and when did Aronsen's action accrue? If it occurred earlier than 300 days before January 19, 1977, Aronsen's notice was untimely.

On the record as developed below, five dates appear as possibilities: 1) March 31, 1975; 2) March 2, 1976; 3) March 18, 1976; 4) March 31, 1976; and 5) April 21, 1976. Depending on full factual development, other dates may also exist. The March 31, 1975, March 2, 1976 and March 18, 1976 dates are outside the 300 day limit and would make Aronsen's notice untimely. Computed from the other two dates, however, notice would have been timely. Zellerbach argues, and the district court agreed, that the alleged unlawful practice (*i.e.*, discharge) occurred at the March 31, 1975 meeting when Aronsen was told he was being terminated and after which his services in fact ceased. Aronsen argues that the discharge occurred when he was taken off the payroll on April 21, 1976, or, alternatively, on March 31, 1976 when he had been informed in writing of termination and when his regular payments stopped and payment for accrued vacation time began. On March 2, 1976, Aronsen was allegedly informed by senior vice-president Jamieson that his employment would be terminated on March 31, 1976. At some point subsequently, Aronsen apparently received a letter, dated March 18, 1976, confirming the earlier meeting with Jamieson.

Zellerbach moved below for dismissal under Federal Rules of Civil Procedure 12(b)(1) and (6). Because the district judge considered affidavits and other matters outside the pleadings, however, the order must be considered a summary judgment under Federal Rule of Civil Procedure 56. *See*

Jablon v. *Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980); *Solinger* v. *A&M Records, Inc.*, 586 F.2d 1304, 1308 (9th Cir. 1978), *cert. denied*, 441 U.S. 908, 99 S. Ct. 1999, 60 L. Ed. 2d 377 (1979). Although there appears to be factual dispute concerning what transpired or some dispute concerning the interpretation of the facts, the district court determined that as to "controlling facts" there was no dispute. It concluded, therefore, that it would determine when the unlawful act occurred as a matter of law. The district court held that discharge occurred on March 31, 1975, thus leaving Aronsen's notice untimely.

In summary judgment, there must be no issue of any material fact and the moving party must demonstrate the right to judgment as a matter of law in the context of undisputed facts. *See Jablon* v. *Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980). In determining whether material factual dispute exists, facts and inferences must be viewed most favorably to the non-moving party. *Mutual Fund Investors, Inc.* v. *Putnam Management Co.*, 553 F.2d 620, 624 (9th Cir. 1977). On a motion for summary judgment, neither an appellate court nor a trial court are permitted to weigh the evidence, pass upon credibility, or speculate as to the ultimate findings of fact. *Pepper & Tanner, Inc.* v. *Shamrock Broadcasting, Inc.*, 563 F.2d 391, 393 (9th Cir. 1977). We need only determine that a result other than the district court's conclusion is possible under the facts and applicable law to require a reversal and remand.

In the district court's ruling, the controlling facts were that Aronsen had notice of his termination at the March 31, 1975 meeting and after that date, except for one brief assignment, he did no work for the company. To these facts, the district judge applied the law as set forth in *Bonham* v. *Dressler Industries, Inc.*, 569 F.2d 187 (3d Cir. 1977), *cert. denied*, 439 U.S. 821, 99 S. Ct. 87, 58 L. Ed. 2d 113 (1978), and ruled that Aronsen's discharge occurred on March 31, 1975.

In *Bonham* the Third Circuit ruled that where unequivocal notice of termination and the employee's last day of work coincide, then "the alleged unlawful act will be deemed to have occurred on that date, notwithstanding the employee's continued receipt of certain employee benefits such as periodic

severance payments or extended insurance coverage." *Bonham*, 569 F.2d at 191. This rule of unequivocal notice of termination plus cessation of services has been widely followed. *See, e.g., Wilkerson* v. *Siegfried Insurance Agency, Inc.*, 621 F.2d 1042, 1044-45 (10th Cir. 1980); *Coke* v. *General Adjustment Bureau, Inc.*, 616 F.2d 785, 788 (5th Cir. 1980), *aff'd on other grounds*, 640 F.2d 584, 585, 587-595 (5th Cir. 1981) (en banc); *Payne* v. *Crane Co.*, 560 F.2d 198, 199 (5th Cir. 1977); *cf. Ricks* v. *Delaware State College*, 605 F.2d 710 (3d Cir. 1979), *rev'd*, 449 U.S. 250, 101 S. Ct. 498, 66 L. Ed. 2d 431 (1980) (applying similar rule in Title VII).

Applying the *Bonham* rule to the facts of Aronsen's case, the district court ruled that the conditions of the rule—notice of termination plus cessation of services—were met on March 31, 1975, leaving that day as the date of discharge. It rejected Aronsen's argument that the rule of *Moses* v. *Falstaff Brewing Corp.*, 525 F.2d 92 (8th Cir. 1975), should be applied. In *Moses*, the court favored an approach that would create an easily ascertainable date by adopting the date of official termination on the company's records as the date of discharge. *Moses*, 525 F.2d at 94.

Our examination of the issue has led us to conclude that neither the *Bonham* nor *Moses* approach adequately states the correct principles of law. This conclusion is buttressed by the Supreme Court's latest pronouncements in *Delaware State College* v. *Ricks*, 449 U.S. 250, 101 S. Ct. 498, 66 L. Ed. 2d 431 (1980), on the analogous Title VII accrual periods.[12] Moreover, even if we assumed that the district court applied the correct principles of law, we disagree with its conclusion that Zellerbach demonstrated its right to judgment as a matter-of-law in the context of undisputed fact. We therefore reverse the grant of summary judgment.

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[12] In *Naton* v. *Bank of California*, 649 F.2d 691, 695 (9th Cir. 1981), we adopted the rule set forth in *Bonham* but expressly reserved the question whether *Bonham* could be applied when unequivocal notice of discharge preceded cessation of services. *Id.* at 695 n.3 (noting conflict between *Ricks*, 449 U.S. at 256-261, 101 S. Ct. at 503-06 and *Bonham*, 569 F.2d at 192). We reach the issue today because the district court found that, despite his inactive status with Zellerbach, Aronsen did perform a brief assignment for the company at an unspecified date after March 31, 1975.

B.

In attempting to formulate a rule on ADEA accrual periods, both *Bonham* and *Moses* sought to erect bright-line, objective standards that would unmistakably establish, for litigants and the courts, the exact date on which the alleged unlawful practice occurred. The Supreme Court's opinion in *Ricks,* however, indicates that mechanical formulae will not suffice to identify accurately the date of the unlawful practice.

In *Ricks,* a college teacher who had been denied tenure brought a Title VII action contending that the college's adverse tenure decision had been engendered by national origin discrimination. Finding that the only unlawful employment practice alleged was the college's decision to deny tenure, the district court held Ricks' action untimely because he had failed to file his complaint with the EEOC within the applicable time limits even though his employment contract did not expire until months after he had received notice of termination. Expressly relying upon *Bonham,* the Third Circuit reversed, holding that a terminated employee who is still working should not be required to consult a lawyer or file charges of discrimination while still working, even though informed of the employer's present intent to terminate in the future. *Ricks,* 605 F.2d at 712.

The Supreme Court reversed and ordered reinstatement of the district court's original order. In response to Ricks' claim of a "continuing violation" under which the limitations period would not begin to run until his contract expired, the Court stated that "[m]ere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination." *Ricks,* 449 U.S. at 504, 101 S. Ct. at 504. The Court squarely identified the alleged act of discrimination as the date the "tenure decision was *made and communicated to Ricks," id.* at 504 (emphasis added and footnote deleted), and clarified the standard under which filing limitations periods commence:

> Complaints that employment termination resulted from discrimination can present widely varying circumstances. In this case the only alleged discriminatory act is

> the denial of tenure sought by a college professor, with termination of employment not occurring until a later date. The application of the general principles discussed herein necessarily must be made on a case-by-case basis.

Id. at ____ n.9, 101 S. Ct. at 504 n.9. Accordingly, " '[t]he proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts [become] most painful.' " *Id.* at 504 (quoting *Abramson* v. *University of Hawaii*, 594 F.2d 202, 209 (9th Cir. 1979)) (emphasis added by Court).

In articulating this standard, the Court clearly rejected the "final date of employment" rule advocated by the Third and Fifth Circuits in *Ricks* and *Bonham* respectively, and also, we feel, the "official date of termination" rule espoused by the Tenth Circuit in *Moses:*

> Although [these] view[s] [have] the virtue of simplicity, . . . [our] discussion . . . demonstrates [their] fallacy as a rule of general application. Congress has decided that time limitations periods commenced with the date of the 'alleged unlawful employment practice.' Where, as here, the only challenged employment practice occurs before the termination date, the limitations periods necessarily commence to run before that date. It should not be forgotten that time-limitations provisions themselves promoted important interests; 'the period allowed for suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones.'

Ricks, 449 U.S. at 259-260, 101 S. Ct. at 505 (citations and footnotes omitted).

We think the Court has indicated beyond doubt that in Title VII and, analogously, ADEA discrimination suits, inquiry for purposes of determining when the limitations period begins to run must center on the date when the employee has notice of the unlawful act; neither cessation of work nor official termination noted on company personnel records is singularly relevant to this inquiry. Judicial review in each case cannot be

facilitated by bright-line approaches because, as the Court has indicated, such formulae tend to obscure and even distort congressional intent. We hold therefore that in ADEA suits, the applicable limitations period is activated once the employee knows or should know that an unlawful employment practice has been committed. Other criteria, such as cessation of services, are relevant in aiding a court to set the operative date only when they indicate that the employee knew or should have known of the commission of the unlawful employment practice and cannot serve to fix mechanically the operative date. Accordingly, the rigid components of the *Moses* and *Bonham* tests are useful only to the extent that courts must rely on objective manifestations of intent to determine subjective knowledge.[13] As the court in *Ricks* has indicated, review must proceed under a case-by-case approach. Under such instruction, we perceive no artificial limit to the range of objective manifestations that could indicate to a court when an employee knows or should know of an unlawful employment practice.[14] Of course, proof of an employee's receipt of written notice of termination would clearly shorten the inquiry concerning the employee's knowledge of termination date (though not necessarily knowledge of an unlawful employment practice)[15] and render more manageable both the employer's burden of establishing notice and the court's task on review. We do not read the Court's language in *Ricks* as a requirement that employers

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[13] The *Moses* test required a change in personnel records in order to activate the accrual period. The court in *Bonham*, however, correctly noted that a change in personnel records is not an objective manifestation of employee intent because there can be no guarantee that an employee knows the status of his or her personnel records: "[W]e would be wary of any approach which determines the timeliness of an employee's suit against his employer solely on the basis of records which are within the exclusive control of the employer." *Id.* at 191.

[14] *See, e.g., Wilkerson*, 621 F.2d at 1044-45 (plaintiff began vacation on termination date); *Coke*, 616 F.2d at 788 (formal notice and demotion commenced with unlawful practice); *Payne*, 560 F.2d at 199 (company perquisites relinquished).

[15] It is conceivable that an employee could have unequivocal notice of termination without any immediate suspicion that the termination was actuated by age discrimination. This situation, however, must be distinguished from contexts in which an employer asserts misleading misrepresentations concerning reinstatement. Such misrepresentations are only relevant on the issue of equitable tolling. *See Naton*, 649 F.2d at 695 n.4.

provide express written notice of termination in every case,[18] but the Court in *Ricks* observed that an employer's letter to Ricks provided "explicit notice that his employment would end upon [the terminal contract's] expiration." 449 U.S. at 258, 101 S. Ct. at 504.

Even if we were to assume that the district court in this case applied the correct law,[17] we cannot agree with its conclusion that Zellerbach is entitled to summary judgment, because the key fact in issue — whether or when Aronsen knew or should have known of the unlawful practice—is not only disputed but inadequately presented for appellate review.

Although Zellerbach contends that Aronsen was informally informed of his termination by March 31, 1975, Aronsen disputes this. The trial record reveals Aronsen's argument that he was not specifically informed before March 31, 1975, of his termination. Under these circumstances, a factual dispute exists on the issue whether Aronsen knew or should have known on or before March 31, 1975 that he was being terminated or that he was being subjected to an unlawful practice.[18]

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[16] Beyond receiving an expressly "terminal" contract, Ricks also received a letter formally communicating his prospective termination. *See Ricks*, 449 U.S. at 253, 101 S. Ct. at 501 n.2. The Court refused to speculate whether an earlier date—when the Board of Trustees apparently informally communicated to Ricks their decision to deny him tenure—could operate as the operative point in time. *See id.* at 506 n.17. Although unclear, the Court's reticence might have originated from a desire to avoid finding that informal, oral notice could suffice. Even so, the Court's commitment to case-by-case analysis to determine the operative date, *Ricks*, 449 U.S. at 258 n.9, 101 S. Ct. at 504 n.9, would tend to conflict with such an interpretation, because in *Ricks*, the earlier, informal notice was directly referable to a consistent extrinsic event—the vote of the Board of Trustees.

[17] Although we cannot approve of the district court's reliance upon *Bonham*, we note that the lower court correctly concluded that resolution of the issue must be a case-by-case process and that the primary focus of inquiry must be on the plaintiff's knowledge, not on an official company termination date.

[18] Aronsen did state in an affidavit that, after March 2, 1976, "if I were to make any complaint to the California Fair Employment Practices Commission or to the U.S. Department of Labor, Crown would promptly terminate me. . . ." Although this implies that Aronsen knew his termination was based on age discrimination, the standard of review on summary judgment precludes such a conclusion.

Resolving all reasonable doubts in favor of Aronsen, as we must in reviewing a grant of summary judgment, we reverse the district court's determination.[19]

IV.

On remand, the issue of equitable tolling may arise. The district court apparently found that the ADEA filing period was not tolled during the year after the March 31, 1975 meeting.[20] We recently held that ADEA filing periods are subject to equitable modification. *Naton*, 649 F.2d at 695-96. Because the facts in this case do not foreclose application of equitable tolling, the district court's grant of summary judgment to Zellerbach on this basis must also be reserved.

In ADEA cases, "equitable tolling or estoppel almost invariably involves the credibility of the various witnesses [and] [c]redibility is difficult to determine from affidavits or depositions." *Wilkerson*, 621 F.2d at 1045; *cf. Naton*, 649 F.2d at 696 (declining to evaluate tolling issue for first time on appeal).[21] Accordingly, summary judgment seldom will be appropriate when tolling is in issue. On review of a grant of

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[19] Similarly, in *Clark* v. *West Chemical Products, Inc.*, 557 F.2d 1155 (5th Cir. 1977), the court held that summary judgment for the date of oral notification was erroneous when there was a later date of written notification and uncertain events between the two dates. The court emphasized that especially on summary judgment, the date of termination must appear without ambiguity. *Id.* at 1157. In *Coke* v. *General Adjustment Bureau, Inc.*, 616 F.2d 785 (5th Cir. 1980), the Fifth Circuit distinguished *Clark* on the basis that in *Clark* only oral notice was involved, whereas in *Coke* there was formal written notice of termination and no ambiguity. *Coke*, 616 F.2d at 788.

[20] Although Aronsen does not raise the issue of equitable tolling as a distinct issue on appeal, it was before the district court because it rendered its dismissal under the assumption that ADEA filing periods are subject to equitable tolling. The issue is also interconnected with the same facts and arguments as the accrual date issue. Consequently, Zellerbach suffers no prejudice. *Cf. United States* v. *Patrin*, 575 F.2d 708, 712 (9th Cir. 1978) (newly-raised issue reviewable where purely one of law since other party not prejudiced thereby); *Krause* v. *Sacramento Inn*, 479 F.2d 988, 989 (9th Cir. 1973) (new issue reviewable when raising significant question of general importance). Moreover, the circumstances and argument surrounding the contested notice date suggest that equitable tolling issues are directly implicated on appeal.

[21] We indicated in *Naton* that there were at least two forms of equitable modification: (1) equitable tolling focusing on the plaintiff's excusable ignorance; and (2) equitable estoppel focusing on the conduct of the defendant. *Naton*, 649 F.2d at 696.

summary judgment, it must appear that the facts as alleged could not reasonably be construed as permitting equitable estoppel or tolling. *See Coke*, 640 F.2d at 595-96. *Jablon*, 614 F.2d at 682.

Although there was some disagreement over what exactly was said at the March 31, 1975 meeting, the basic facts are not significantly disputed. Based on those facts, Aronsen offers the inferred fact that he was inhibited from filing a notice with the ADEA for fear of losing his "terminal year" severance pay, losing his eligibility for early retirement, and losing company aid in finding other work. Whether this inhibition was reasonable under the circumstances and whether it was the result of a plan that would intentionally or foreseeably lull[22] grievants and delay ADEA filings are factual questions pertinent to the equitable estoppel issue that are improper for summary judgment treatment. The facts could support an estoppel argument. Similarly, if Aronsen had been led to believe by company actions that his "termination" was not irrevocable, equitable estoppel might have been appropriate. On remand, factual development will be necessary to resolve these and any other tolling issues that may arise.

V.

In summary, we reaffirm the holding of *Bean* v. *Crocker National Bank*. ADEA grievants in deferral states have up to 300 days within which to file their notice or charge. We also conclude that the district court erred in granting Zellerbach's motion for summary judgment on the filing deadline issue. The record on appeal indicates that factual dispute exists concerning both the date Aronsen knew or should have known of the alleged unlawful practice and the question of equitable modification.

REVERSED and REMANDED for proceedings consistent with this opinion.

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[22] In some of the equitable estoppel cases, the employer's conduct was found to hold out the possibility of reinstatement or otherwise to "lull" the employee into foregoing a timely filing. *See Wilkerson*, 621 F.2d at 1045-46 (employee allegedly misled as to reason for discharge); *Coke*, 640 F.2d at 595-96 (company misrepresentations that employee's demotion would be remedied); *Bonham*, 569 F.2d at 192-93 (company letter expressing optimistic view that company would find alternative employment within company for employee).

APPENDIX B

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ARTHUR N. ARONSEN, *Plaintiff-Appellant,* v. CROWN ZELLERBACH, a corporation, *Defendant-Appellee.*	No. 78-1621 ORDER AMENDING OPINION June 2, 1982

Before: TANG and PREGERSON, Circuit Judges, and KELLEHER,* District Judge.

The Opinion filed November 23, 1981, in the above-entitled case shall be amended as follows:

Delete the following:

(1) Slip opinion page 5831, column 1, lines 4-6:

"(though not necessarily knowledge of an unlawful employment practice)[15]"

(2) Slip opinion page 5831, column 1, footnote 15:

"15. It is conceivable that an employee could have unequivocal notice of termination without any immediate suspicion that the termination was actuated by age discrimination. This situation, however, must be distinguished from contexts in which an employer asserts misleading misrepresentations concerning reinstatement. Such misrepresentations are only relevant on the issue of equitable tolling. See Naton, 649 F.2d at 695 n.4."

* Honorable Robert J. Kelleher, United States District Judge for the Central District of California, sitting by designation.

(3) Slip opinion page 5831, column 1, lines 18-22, column 2, lines 1-17:

[8] Even if we were to assume that the district court in this case applied the correct law,[17] we cannot agree with its conclusion that Zellerbach is entitled to summary judgment, because the key fact in issue—whether or when Aronsen knew or should have known of the unlawful practice—is not only disputed but inadequately presented for appellate review.

Although Zellerbach contends that Aronsen was informally informed of his termination by March 31, 1975, Aronsen disputes this. The trial record reveals Aronsen's argument that he was not specifically informed before March 31, 1975, of his termination. Under these circumstances, a factual dispute exists on the issue whether Aronsen knew or should have known on or before March 31, 1975 that he was being terminated or that he was being subjected to an unlawful practice.[18]"

(4) Slip opinion page 5831, column 2, footnote 18:

18. Aronsen did state in an affidavit that, after March 2, 1976, "if I were to make any complaint to the California Fair Employment Practices Commission or to the U.S. Department of Labor, Crown would promptly terminate me . . . ." Although this implies that Aronsen knew his termination was based on age discrimination, the standard of review on summary judgment precludes such a conclusion.

(5) Slip opinion page 5832, column 1, lines 1-2:

"On remand, the issue of equitable tolling may arise."

Add the following:

(1) Slip opinion page 5831, column 1, lines 18-22, column 2, lines 1-17:

Even if we were to assume that the district court in this case applied the correct law,[17] we cannot agree with its conclusion that Zellerbach is entitled to summary judgment.

The record does establish that Aronsen was informed as early as March of 1975 that Crown planned to terminate him. Without more this would seem to entitle Crown to summary judgment. The record also reveals, however, that Aronsen believed that Crown might reconsider its decision to terminate him. Whether this belief was reasonable is not a matter that can be determined on summary judgment.

Resolving all reasonable doubts in favor of Aronsen, as we must in reviewing a grant of summary judgment, we reverse the district court's determination.[19]

(2) Slip opinion page 5832, column 1, lines 1-2:

"Aronsen's belief that Crown might reconsider its decision to terminate him raises the issue of equitable modification."

Footnotes to be renumbered accordingly, taking into account deletion of footnotes 15 and 18.

APPENDIX C

IN THE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ARTHUR N. ARONSEN and MARIE LOUISE ARONSEN, *Plaintiffs,* v. CROWN ZELLERBACH, a corporation, *Defendant.*	**No. C-77-1210-WWS** **Order Denying Motion To Reconsider** **January 16, 1978**

SCHWARZER, DISTRICT JUDGE:

Plaintiff has moved for reconsideration of the Court's order of December 16, 1977, dismissing the complaint. Since the motion does not deal with the dismissal of counts two through five, no further discussion of the allegations and claims stated in those counts is necessary.

Count one was dismissed for failure on plaintiff Arthur Aronsen's part to give timely notice to the Secretary of Labor pursuant to 29 U.S.C. § 626(d)(2). The Court's action was not based on his failure to bring before the Court deposition testimony and other factual matter in the manner specified in L.R. 220-8. In any event, the Court has now reconsidered its prior order on the basis of *all* of the pleadings and papers before the Court.

Section 626(d) provides that no civil action under ADEA may be commenced until plaintiff has given the Secretary of Labor "not less than sixty days' notice of an intent to file such action. Such notice shall be filed . . . within three hundred days after the alleged unlawful practice occurred. . . ."

The Court will assume for present purposes that this provision is not jurisdictional but merely creates a statute of limitations. *See, Dartt* v. *Shell Oil Co.*, 539 F.2d 1256, 1260 (10th Cir. 1976), *aff'd per curiam*, 46 U.S.L.W. 4021 (Nov. 29, 1977). It will also assume that the three hundred day, rather than the one hundred eighty day period, applies.

The issue before the Court is when "the alleged unlawful practice occurred." That issue can be decided on this record as a matter of law, there being no dispute concerning the controlling facts. Plaintiff's complaint alleges that defendant terminated him on April 21, 1976. Plaintiff gave notice of intent to sue to the Secretary of Labor on January 19, 1977, about 270 days later. Plaintiff's testimony on deposition shows, however, that approximately a year before April 1976,

> My assignment was modified . . . by notice that they wanted to get rid of me or terminate me.

According to plaintiff, defendant's executive vice president told plaintiff at that time

> . . . that I was being terminated, or words to that effect . . .

Plaintiff was given the choice between taking a demotion to a job in Los Angeles (which he declined) or accepting defendant's assistance in finding another position. Plaintiff was told he would be able to remain on defendant's payroll for six months, later extended to a full year and was allowed to retain his office. He was, however, relieved of his duties and (except for one brief assignment) ceased doing work for defendant; instead, he spent his time looking for another job, as directed by defendant, and doing consulting work. A letter from defendant to plaintiff, dated March 18, 1976, reflects defendant's understanding that while plaintiff's employment with defendant "terminated" on March 31, 1976, his "terminal leave of absence with pay . . . began April 1, 1975."

Plaintiff contends that the notice period did not begin to run until "termination" of employment, relying on *Moses* v. *Falstaff Brewing Corp.*, 525 F.2d 92 (8th Cir. 1975). There plaintiff was advised of her discharge on November 12, her final day of work was November 16, but she was paid through November 30. If the critical date had been November 16, her notice would have been filed about eight days late. The court held that the official date of termination should be regarded as the date of the unlawful practice. It pointed out that the notice requirement "is intended to serve the purposes of the Act by insuring that the Secretary of Labor is called in for conciliation purposes *when disputes are fresh* and by informing the employer of his employee's intentions at an early date." (525 F.2d at

94, emphasis added) And it then noted that in many instances, as in that case, "the time between notice of discharge and administrative termination could be so small as to be inconsequential." (525 F.2d at 94)

Moses does not help plaintiff in this case. Plaintiff received notice of his discharge and was relieved of his duties in March 1975. He delayed giving notice of intent to sue until January 1977, nineteen months after he first learned that he was being terminated by defendant. Here, then we do not have an inconsequential difference of a few days. The delay in giving notice was so great in this case as to defeat the purpose of the notice provision to bring about conciliation when disputes are fresh. *See, also, Dartt* v. *Shell Oil Co.*, above, 539 F.2d at 1261.

The answer to the question when the alleged unlawful practice occurred must therefore turn on the facts and circumstances of each case. The date of offical termination may be the appropriate date in one case but not another. Here the facts establish without material dispute that in March 1975, plaintiff was told by defendant's executive vice president that he was being terminated, that he was being relieved of his duties as of the end of the month and that the defendant would assist him in finding another job. If defendant took these actions because of plaintiff's age, they clearly amounted to "discriminat[ion] against [an] individual with respect to his . . . terms, conditions, or privileges of employment," and hence a violation of Section 623(a)(1). That defendant placed plaintiff on terminal leave and continued his salary until April 1976 does not constitute a separate unlawful practice nor does it toll the operation of Section 626(d). *See Bonham* v. *Dresser,* 424 F. Supp. 891, 895-96 (W.D. Pa. 1976); *Davis* v. *RJR Foods, Inc.*, 420 F. Supp. 930, 931, n. 1 (S.D.N.Y. 1976).

For the reasons stated, the motion is denied.

It is so ordered.

APPENDIX D

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ARTHUR N. ARONSEN, *Plaintiff-Appellant,* v. CROWN ZELLERBACH, a corporation, *Defendant-Appellee.*	No. 78-1621 ORDER June 21, 1982

Before: TANG and PREGERSON, Circuit Judges, and KELLEHER,* District Judge.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

* Honorable Robert J. Kelleher, United States District Judge for the Central District of California, sitting by designation.

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No. 82-495

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CROWN ZELLERBACH CORPORATION,
Petitioner,

v.

ARTHUR N. ARONSEN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Supplemental Brief in Support of Petition for Writ of Certiorari

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Supplemental Brief in Support of Petition for Writ of Certiorari

INTRODUCTION

Pursuant to rule 22.6 of this Court's Rules, Crown Zellerbach Corporation ("Crown") files this supplemental brief in support of its previously filed petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit. This brief is intended to draw the Court's attention to an intervening matter that has occurred since Crown filed its petition on September 20, 1982.

BACKGROUND

The issue before this Court is whether the decision of the court of appeals can stand in light of this Court's clear pronouncements in *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980), and *Chardon* v. *Fernandez*, 454 U.S. 6 (1981). Those cases held that the time in which to raise an employment discrimination claim commences when the employee is informed of the allegedly discriminatory employment decision, not when that decision takes effect. They further held that commencement of the period to file is not delayed even if the employee reasonably believes that the employer will reconsider the decision, or because the employee continues in employment after the decision is announced.

The Ninth Circuit disregarded *Ricks* and *Chardon*. It held that even though Aronsen failed to file his claim of discrimination on time, Crown was not entitled to summary judgment because Aronsen had received severance benefits and contended that he thought Crown might reconsider its decision to terminate him. Crown therefore petitioned for a writ of certiorari pursuant to rule 17.1(c) of this Court's Rules to resolve this "conflict with applicable decisions of this Court."

Crown files this supplemental brief because the Ninth Circuit's holding also conflicts with a recent decision of the United States Court of Appeals for the Fourth Circuit.

THE FOURTH CIRCUIT'S DECISION

On October 18, 1982, this Court denied a petition for a writ of certiorari to the Fourth Circuit in *Lawson* v. *Burlington Industries, Inc.*, No. 82-325, a case with facts strikingly similar to those here. This Court left standing the Fourth Circuit's decision, reported at 683 F.2d 862 and reproduced as the appendix to this brief, which clearly conflicts with the Ninth Circuit's opinion. Thus, there is now a conflict between two courts of appeals on the same question, and under rule 17.1(a) of this Court's Rules another ground exists for granting Crown's petition.

Lawson brought his action under the Age Discrimination in Employment Act, alleging that he had been terminated from employment and denied a job transfer because of his age. He had filed his discrimination charge after the statutory deadline, but he contended that his action was not time-barred because he had thereafter received severance benefits and was assured by Burlington that although he was out of work, "maybe we'll come up with something else . . . if we do, we'll be in touch." 683 F.2d at 863.

Notwithstanding these facts, the district court granted Burlington's motion for summary judgment on the ground that the charge was time-barred. On appeal, the Fourth Circuit affirmed the district court, holding that as a matter of law the charge was untimely.

> The thrust of Lawson's contention is that the filing period should be equitably tolled because he believed Burlington would eventually find a position for him. However, the facts are uncontroverted that Burlington in no way misled Lawson or misrepresented his prospects for future employment. Lawson's optimistic hope that he would be recalled within the 270-day period falls short of demonstrating the "reasonable reliance on the defendant's conduct or representations" necessary to justify equitable tolling in this situation.

Id. at 684. This Court denied Lawson's petition for a writ of certiorari.

Although it did not cite *Ricks* or *Chardon*, the Fourth Circuit's opinion is clearly consonant with those decisions, and clearly conflicts with the Ninth Circuit's holding in this matter. Like Burlington, Crown did nothing more than pay severance benefits to a terminated employee. Like Lawson, Aronsen filed his charge of discrimination late, and contended that its untimeliness should be excused because of the payment of those benefits and because he thought the company might reconsider its decision to terminate him. Indeed, the facts are even weaker for Aronsen than they were for Lawson; nothing in the record suggests that Crown represented to Aronsen that it might

reconsider its decision to terminate him. Yet *unlike* the Fourth Circuit and this Court, the Ninth Circuit held that the employer was not entitled to summary judgment because of the employee's professed belief that the employer might reconsider its decision and because of his receipt of severance benefits.

The Ninth Circuit's holding cannot be reconciled with *Ricks, Chardon* or *Lawson*. Unless this Court grants Crown's petition for certiorari, the conflict of the Ninth Circuit's holding with the decisions of this Court and the Fourth Circuit will remain. Crown asks that this Court exercise its power of review to remove that conflict.

CONCLUSION

For the reasons set forth in its petition and this supplemental brief, Crown's petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 29, 1982

APPENDIX

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

BERLIN L. LAWSON, *Appellant,* v. BURLINGTON INDUSTRIES, INC., *Appellee.*	No. 81-2192 July 22, 1982

Before BUTZNER and SPROUSE, Circuit Judges, and KISER,* District Judge.

SPROUSE, Circuit Judge:

Berlin L. Lawson brought this suit under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, alleging that Burlington Industries, Inc. unlawfully terminated his employment and refused to transfer him to an acceptable position because of his age. The district court granted summary judgment for the defendant on the grounds that Lawson failed to file his discrimination charge within the statutory time period,[1] and that no equitable justifications for tolling the statutory period existed. We affirm.

* Honorable Jackson L. Kiser, United States District Judge for the Western District of Virginia, sitting by designation.

[1] 29 U.S.C. §626(d)(1) provides:

(d) No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the [Equal Employment Opportunity Commission]. Such a charge shall be filed—(1) within 180 days after the alleged unlawful practice occurred . . .

Lawson was first hired by Burlington in 1959, and in 1979 he was working at the transportation facility of Klopman Mills, a division of Burlington. On April 1, 1979, all employees were informed that the facility was closing, that Burlington would attempt to find new positions for employees displaced by the closing, and that those employees not placed by June 30, 1979 would be terminated. Employees terminated because of the facility closing would have their benefits and company service credit restored if they were rehired within 270 days of their termination. Lawson's final day of work was June 30, 1979, although he was given severance pay through December, 1979.

Shortly before his termination Lawson, then age 44, complained to Burlington officials that a younger co-worker, age 38, was being transferred to an available position elsewhere in the company while he was being laid off. Lawson had more service with the company and believed he was better qualified, so he concluded that age discrimination was the motive behind the decision to transfer the younger worker rather than himself.

Lawson closed his retirement and profit-sharing accounts with Burlington when he was terminated; he received a lump-sum distribution of cash and stock, plus his severance pay, on July 19, 1979. Burlington offered Lawson a clerical job in another city on or about October 1, 1979, but he refused the position because of the inadequate salary. He was then told by a company official that "maybe we'll come up with something else . . . if we do, we'll be in touch."

Lawson filed his age discrimination charge with the EEOC on February 5, 1980. He testified that he had considered filing the charge earlier, but had refrained because he hoped to be recalled. The EEOC charge dealt only with Burlington's decision to lay off Lawson while transferring the younger employee. Lawson filed suit in district court in June, 1980, claiming that age discrimination was the motive behind both the layoff and the October offer of a clerical position, which Lawson construed as a refusal to hire him.

Burlington moved to dismiss the complaint for lack of subject matter jurisdiction, Fed. R. Civ. P. 12(b)(1), or alternatively for summary judgment, Fed. R. Civ. P. 56, on the

grounds that (1) Lawson had not filed his EEOC charge within 180 days after the alleged unlawful practice occurred and (2) his complaint was impermissibly broad as it raised issues not included in the EEOC charge. Following oral argument by both parties the district court granted summary judgment for the defendants, ruling that "[w]ith respect to the layoff on June 30, 1979, his charge of discrimination was filed more than 180 days after such layoff, and with respect to the other acts of discrimination alleged in the complaint, no charge of discrimination had been filed, and more than 180 days have now expired. Plaintiff has not presented a justification for this failure, which is sufficient to entitle him to equitable relief . . . ."

Lawson first contends that the district court erred in dismissing from his complaint those allegations which were not included in his February 5, 1980 EEOC charge. We disagree. Illegal layoff—the charge which appeared in the EEOC notice —does not encompass an allegation of illegal failure to rehire. It is well established that a layoff from employment constitutes a completed act at the time it occurred, *Griffin* v. *Pacific Maritime Assoc.*, 478 F.2d 1118 (9th Cir.), *cert. denied*, 414 U.S. 859, 94 S. Ct. 69, 38 L. Ed. 2d 109 (1973), and that an employer's failure to recall or rehire does not constitute a continuing violation of the ADEA. Each alleged discrimination recall constitutes a separate and completed act by the defendant, which triggers a new 180 day period. *Morris* v. *Frank Ix & Sons, Inc.*, 486 F. Supp. 728 (W.D. Va. 1980). As no EEOC charge relating to recall was filed within 180 days of October 1, 1979, the district court's determination that Lawson failed to file within the statutory time period was correct.

Lawson next contends that the grant of summary judgment was improper because there exists a genuine issue of fact with respect to whether equitable tolling of the 180-day requirement occurred.[2] Lawson had an opportunity at the hearing on Burlington's motion for summary judgment to present those facts which he asserts should equitably toll the 180-day requirement. After hearing the evidence, the district court determined

[2] *Cf. Zipes* v. *Transworld Airlines*, —U.S.—, 102 S. Ct. 1127, 71 L. Ed. 2d 234 (1982) (180-day time limit for filing charges under Title VII of the Civil Rights Act of 1964 is not a jurisdictional prerequisite to suit in a district court).

that no genuine issue of fact with respect to equitable tolling existed and that Burlington was entitled to judgment as a matter of law. We agree. Lawson maintains that equitable tolling is justified because his filing of EEOC charges was delayed by his expectation that he would be recalled to work. That expectation arose from three factors: (1) his 6-month severance pay from Burlington, (2) his right to full reinstatement within 270 days of layoff and (3) the offer of a position to him in October, 1979 and Burlington's representation that he would be considered for future positions.

The thrust of Lawson's contention is that the filing period should be equitably tolled because he believed Burlington would eventually find a position for him. However, the facts are uncontroverted that Burlington in no way misled Lawson or misrepresented his prospects for future employment. Lawson's optimistic hope that he would be recalled within the 270-day period falls short of demonstrating the "reasonable reliance on the defendant's conduct or representations" necessary to justify equitable tolling in this situation. *See Naton* v. *Bank of California,* 649 F.2d 691 (9th Cir. 1981); *Wagner* v. *Sperry Univac,* 458 F. Supp. 505 (E.D. Pa. 1978), *aff'd mem.* 624 F.2d 1092 (3d Cir. 1980).

The grant of summary judgment for the defendant by the district court is, therefore, affirmed.

AFFIRMED.

Supreme Court, U.S.
FILED
JAN 14 1983
ALEXANDER L. STEVAS
CLERK

No. 82-495

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

CROWN ZELLERBACH CORPORATION,
Petitioner,

vs.

ARTHUR N. ARONSEN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Is a court of appeals permitted under *Delaware State College v. Ricks* and *Chardon v. Fernandez* to reverse a grant of summary judgment in favor of an employer under the Age Discrimination in Employment Act on an issue of when a limitations period begins to run, where there is a factual dispute in the record as to when unequivocal notice to terminate on a specific date was given?

2. Should this Court decline to review a court of appeals' reversal of summary judgment and its remand to the district court to develop a more complete factual record on whether a limitations period has been equitably tolled by employer conduct, in light of this Court's recent holding in *Zipes v. Trans World Airlines, Inc.* that civil rights limitations statutes are subject to equitable modification?

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CROWN ZELLERBACH CORPORATION,
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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

INTRODUCTION

At issue in this Petition for Writ of Certiorari is whether every advance indication by an employer of a future intent to terminate an employee, no matter how ambiguously phrased, shall be governed by the rule of *Delaware State College v. Ricks,* 449 U.S. 250 (1980) and *Chardon v. Fernandez,* 454 U.S. 6 (1981) which cases mandate the commencement of the running of limitations periods at the time of giving of such notice of termination or whether, on the other hand, courts of appeal may require, before *Ricks* and *Chardon* may be applied on summary judgment, a minimal factual record of both an unequivocal intent to terminate and the inapplicability of the doctrine of equitable tolling of the limitations period.

STATEMENT OF THE CASE

Petitioner, Crown Zellerbach, contends for a date for the commencement of the running of the limitations period in March of 1975. The factual record of what happened on that unspecified date is not entirely clear since the district court dismissed the action on a motion for summary judgment. According to Crown, on a date "in the spring of 1975, sometime on or before March 31," which date could not be pinpointed, Aronsen, who had at that time worked for the company for 27 years and was a middle level executive, was told by an executive Vice President that:

> "his employment at Crown was terminated and that, effectively (sic) immediately, any job duties or responsibilities which he formerly had to Crown were ended" C.R. 63.[1]

No writing memorializing this conversation was a part of the record below, and apparently none was ever made.

Aronsen recalled the Mitchell conversation quite differently. Aronsen testified on deposition that Mitchell said "I was being terminated, or words to that effect, and my reaction was that I didn't believe it." C.R. 105. By affidavit in opposition to the motion to dismiss, Aronsen explained that "Mitchell never used the word 'termination', but I interpreted the conversation as giving me notice that Crown was getting ready to terminate me." C.R. 148.

In the same conversation, Mitchell gave Aronsen the option of taking a lesser position in Los Angeles at a 20 per cent cut in pay or remaining at full salary, while being relieved of all responsibility to perform work for Crown,

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[1]Citations are to the record before the court of appeals.

and utilizing the services of an executive employment service. C.R. 63, 106, 149.

After a week of reflection, Aronsen told Mitchell that he had elected the second alternative. Mitchell then offered to continue Aronsen's employment for six months while he used the services of the employment agency. This period was extended another six months, through March 31, 1976. Aronsen continued "on the payroll" during this period C.R. 106.

Not until Crown made its motion to dismiss did Mitchell characterize Aronsen's salary after the conversation as "severance benefits." Regardless of the label Crown concedes that Aronsen continued to be paid "at his then current salary rate" until March 31, 1976. C.R. 63. The district court seized upon Crown's characterization of Aronsen salary as "severance benefits," in ruling on Crown's motion to dismiss, even though Crown introduced none of the personnel records in its possession which would have settled this question of fact.

During that year, Aronsen did very little work for Crown while he undertook a wide-ranging, unsuccessful search for a new job. C.R. 149. In the summer of 1975, he was called in to advise respecting a problem at one of Crown's plants, which occupied a few days. C.R. 104, 190; R.T. 12/16/77, p. 7.

During the year following the Mitchell conversation, Aronsen also took on a few outside consulting jobs for which he was compensated directly. However, this was only after Aronsen had expressly sought and received Mitchell's permission, conduct wholly inconsistent with prior termina-

tion of the employer-employee relationship. C.R. 105, 197, 114, 116.

During the year following the Mitchell conversation, Aronsen continued every incident of his employment. He retained his office and secretary in Crown's corporate headquarters in San Francisco; he reported through the same chain of command in the same research division where he had been assigned for several years and he continued to submit expense account forms in the same manner as before the Mitchell conversation. There was no change in his status on the personnel records of Crown. C.R. 150.

Finally, on March 18, 1976, Aronsen received his first written notice of termination, by letter from Senior Vice-President M.M. Jamieson. C.R. 161. This letter confirmed a March 2, 1976 conversation with Aronsen "regarding your termination of employment with Crown Zellerbach on March 31, 1976." The letter introduced an apparent ambiguity, however, respecting Aronsen's status during the year after the Mitchell conversation, by referring to that period as a "terminal leave of absence with pay which began April 1, 1975." C.R. 161.

The district court interpreted this reference to "terminal leave of absence" as signalling that "termination" occurred on March 31, 1975, rather than the "termination" on March 31, 1976 actually identified in Jamieson's letter. Crown submitted no personnel records that would have settled this question of fact.

The district court held that the unlawful employment practice occurred at the March, 1975 meeting, at which time Aronsen was either told that he "was terminated", or was told that his employer "was getting ready to terminate me".

REASONS FOR DENYING THE WRIT

I

THE COURT OF APPEALS' CONCLUSION THAT IT DID NOT HAVE BEFORE IT AN ADEQUATE RECORD ON WHICH TO DETERMINE THAT THE RICKS-CHARDON RULE APPLIED DOES NOT MERIT REVIEW BY THIS COURT

In *Delaware State College v. Ricks*, 449 U.S. 250 (1980) this Court held that a communicated decision to deny tenure to a college teacher begins the running of applicable limitations periods in claims under Title VII and 42 USC § 1981 and that the granting of a one year terminal teaching contract thereafter did not, when the only discriminatory act pleaded was the denial of tenure, extend the time within which to file. In *Chardon v. Fernandez*, 454 U.S. 6 (1981) it was held that an unequivocal notice of termination which is by its terms to be effective on a specific future date commences the running of the period of limitations. *Ricks* was decided by this Court after briefing was completed below in the Ninth Circuit and at the court's request supplemental briefing on the applicability of *Ricks* was provided. In its opinion, the Ninth Circuit applied the *Ricks* standard and determined that summary judgment was an inappropriate procedure to resolve factual issues concerning when termination took place and whether equitable tolling of the limitations period took place. The Ninth Circuit emphasized the essentially factual nature of the determinations to be made under *Ricks* and the inappropriateness of making these determinations on summary judgment.

In *Ricks*, this Court stated:

> "Complaints that employment termination resulted from discrimination can present widely varying cir-

cumstances. In this case the only alleged discriminatory act is the denial of tenure sought by a college professor, with the termination of employment not occurring until a later date. The application of the general principles discussed herein necessarily must be made on a case-by-case basis." 449 U.S. at 258, n. 9.

Now that this Court has resolved the prior uncertainty as to whether continued employment following notice of intention to terminate tolls the running of the limitations period, the "case-by-case" adjudications of the factual bases for the application of the rule should be left to trial courts and to the various courts of appeal. When a circuit concludes that an inadequate factual record presented by summary judgment disposition mandates remand, the normal considerations governing this Court's exercise of its *certiorari* jurisdiction require a decision to decline the petition.

II

THE NINTH CIRCUIT'S RULING ON THE ISSUE OF EQUITABLE TOLLING SHOULD NOT BE REVIEWED BY THIS COURT UNLESS THIS COURT INTENDS TO ANNOUNCE A NEW RULE COMPLETELY PROHIBITING THE EQUITABLE TOLLING OF PERIODS OF LIMITATION UNDER ADEA

The Ninth Circuit properly considered and ruled on the issue of equitable tolling of the limitations period. Although the parties did not plead the issue in the district court nor argue or brief the issue to the Ninth Circuit, the district court did in fact rule on the issue in its grant of summary judgment by holding that Crown's acts after announcing its intent to discharge Aronsen did not "toll the operation of Section 626(d)." See Petition for Writ of Certiorari, Appendix C at 3c.

Even if the district court had not considered the tolling issue, the Ninth Circuit could properly have raised it. Although an appellate court does not generally consider issues unless raised below, this rule of practice is not inflexible. *Hormel v. Helvering*, 312 U.S. 552, 556 (1941). "There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court . . . below." Id. at 557.

Among those "exceptional cases" referred to in *Hormel* are "those in which there have been judicial interpretations of existing law after decision below and pending appeal-interpretations which if applied might have materially altered the result." Id. at 558-59 (footnote omitted). *Hormel* itself was such a case, as is the case at bar. As noted by the Ninth Circuit, that court's holding, in *Naton v. Bank of California*, 649 F.2d 691, 695-96 (9th Cir. 1981), that the Age Discrimination in Employment Act's limitations periods were subject to equitable modification, was subsequent to the district court's 1978 decision in the case at bar. *See Aronsen v. Crown Zellerbach*, 662 F.2d 584, 595 (9th Cir. 1981); Petition, Appendix C. Given the newly developed, carefully explained standards of *Naton*, the Ninth Circuit obviously believed the district court's cursory treatment of the equitable tolling issue was inadequate. Id at 595. The Ninth Circuit's judgment was squarely within the *Hormel* rule and consistent with the policy behind that rule.

The policy behind the general practice of not considering issues unless raised below—that litigants not be suprised on appeal by final decision there on issues upon which they have had no opportunity to introduce evidence, was also

consistent with the Ninth Circuit's decision because the court did not reach the merits of the equitable tolling issue, but merely remanded the issue to the district court for a fuller consideration of the facts, in light of more recent legal developments. *See Aronsen*, 662 F.2d at 595-96. Crown will have ample opportunity on remand to brief, argue and present evidence on the equitable tolling issue and thus is not prejudiced by the Ninth Circuit's handling of this issue.

The Ninth Circuit's holding that the facts of this case may support an equitable tolling argument is entirely consistent with this Court's handling of equitable tolling of civil rights limitations statutes. In *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982) this Court for the first time expressly held that a time limit for filing an employment discrimination charge was "not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." *Id.* at 393 (footnote omitted). Although *Zipes* was a Title VII case, there is no doubt that the Court intended the above holding to apply to ADEA cases as well since the Court relied in part on the legislative history of the ADEA in formulating the *Zipes* rule. *Id.* at 395, n. 11.

That the *Zipes* holding in no way conflicts with *Ricks* is demonstrated by the Court's citation to *Ricks* as one of the earlier Supreme Court cases which implied what *Zipes* held expressly—that civil rights limitations statutes are subject to equitable modification. *See Zipes* 455 U.S. at 395-96, n. 12.

Petitioner appears to be seeking review of the factual basis for the Ninth Circuit's ruling on the equitable tolling

issue. The Ninth Circuit's precise holding on this issue was: "Because the facts in this case do not foreclose application of equitable tolling, the district court's grant of summary judgment to (petitioner) on this basis must . . . be reversed." *Aronsen*, 662 F.2d at 595. Recognizing the factual nature of equitable tolling and that the issue almost always involves the credibility of witnesses, the court merely held that the issue should not have been decided on summary judgment. *Ibid.*

The Ninth Circuit's holding is entirely consistent with the Fourth Circuit's decision in *Lawson v. Burlington Industries, Inc.*, 683 F.2d 862 (4th Cir. 1982)[2]. The *Lawson* court upheld a grant of summary judgment for the defendant on the equitable tolling issue, based on the particular facts of that case, which plaintiff had an opportunity to present and argue prior to the district court's granting of the judgment. *See Lawson*, 683 F.2d at 864. The controlling distinction between *Lawson* and the case at bar is that here the equitable tolling issue was not fully briefed or presented prior to the district court's grant of summary judgment. *See Aronsen*, 662 F.2d at 595, n. 20. The district court decided the issue in passing and, in the Ninth Circuit's view, on a clearly inadequate factual record. *Id.* at 595.

This court should decline to review the factual aspect of the equitable tolling issue in this case. The Supreme Court does not grant certiorari "to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). That this well established rule applies to

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[2]This case appears to be the sole basis for petitioner's filing of its Supplemental Brief in Support of Petition for Writ of Certiorari.

the instant case is borne out by this Court's disposition of *Zipes*, where after holding that the limitations period was subject to waiver and equitable modification, the Court declined to consider the factual merits of the case, properly leaving that function to the lower courts. Another reason for following the *Johnston* rule is that the inadequacy of the factual record in this case would preclude any meaningful examination of the factual aspect of the equitable tolling issue.

Since the equitable tolling issue was properly before the Ninth Circuit, and that court's ruling merely required a fuller examination of the factual aspect of this issue, this Court should decline to review the equitable tolling issue since the ruling below is completely consonant with the holding of *Zipes* and, because it is merely a remand to develop a more complete factual record, not inconsistent with *Ricks* or *Chardon*.

CONCLUSION

The decision of the court of appeals is fully consistent with the decisions of this Court in *Ricks* and *Chardon* and in view of the inadequate factual record below was mandated by this Court's decision in *Zipes*. The petition for writ of certiorari should be denied.

January 14, 1983

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